

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

BILLY L. MARSHALL,)
Plaintiff,)
v.) No. 05-0028-CV-W-FJG -SSA
JO ANNE B. BARNHART,)
Commissioner of Social Security,)
Defendant.)

ORDER

Before the Court are (1) Plaintiff's Social Security brief (Doc. No. 8), and (2) Defendant's Motion to Reverse and Remand (Doc. No. 9). Plaintiff filed no objections to defendant's motion to reverse and remand.

Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), provides for judicial review of a “final decision” of the Commissioner of the Social Security Administration under Title II. Section 1631(c)(3) of the Act, 42 U.S.C. § 1383(c)(3), provides for judicial review to the same extent as the Commissioner’s final determination under section 205. Judicial review of the Commissioner’s final decision under 42 U.S.C. § 405(g) (1994) is limited to whether there exists substantial evidence in the record as a whole to support the decision of the Commissioner. Siemers v. Shalala, 47 F.3d 299, 301 (8th Cir. 1995). This determination requires review of the entire record, including both evidence in support of, and in opposition to, the Commissioner’s decision. Fountain v. Railroad Retirement Bd., 88 F.3d 528, 530 (8th Cir. 1996). The Court’s role, however, is not to re-weigh the evidence or try the issues de novo. Craig v. Chater, 943 F. Supp. 1184, 1188 (W.D. Mo. 1996) (citing McClees v. Shalala, 2 F.3d 301, 302 (8th Cir. 1994)). When supported by substantial evidence, the Commissioner’s findings are conclusive and must be affirmed. Richardson

v. Perales, 402 U.S. 389, 401 (1971).

Substantial evidence is more than a mere scintilla but less than preponderance. It means such evidence that a reasonable mind would accept as adequate to support a conclusion. Johnson v. Chater, 108 F.3d 178, 179 (8th Cir. 1997), citations omitted. The substantial evidence standard, however, presupposes a zone of choice within which the decision makers can go either way, without interference by the courts. Clarke v. Bowen, 843 F.2d 271, 272-73 (8th Cir. 1988). “[A]n administration decision is not subject to reversal merely because substantial evidence would have supported an opposite decision.” Id. Hence, “if it is possible to draw two inconsistent positions from the evidence and one of those positions represents the agency’s finding, we must affirm the decision.” Roe v. Chater, 92 F.3d 672, 672 (8th Cir. 1996) (quoting Robinson v. Sullivan, 956 F.2d 836, 838 (8th Cir. 1992)).

An individual claiming disability benefits has the burden of proving he or she is unable to return to the type of work in which he or she was formerly engaged due to a medically determinable physical or mental impairment that has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. § 423(d) (1) (A). If the claimant succeeds, the burden of production shifts to the commissioner to establish that plaintiff can perform some other type of substantial gainful activity in the national economy. See Young v. Apfel, 221 F.3d 1065, 1069, n. 5 (8th Cir. 2000); see also, 68 Fed. Reg. 51,153 - 51,163 (August 26, 2003); 20 C.F.R. § 404.1560(c)(2).

The Court has reviewed the parties’ briefs, the decision of the ALJ, the transcript of the hearing and the additional medical and documentary evidence. In this case, the Court cannot find substantial evidence on the record to support the secretary’s decision.

Specifically, the Court agrees with agency counsel and the Appeals Council that remand for further consideration is appropriate in this case. Defendant represents that, upon receipt of the Court's remand order, the case will be remanded to an ALJ who will be directed to (1) address the medical evidence pertaining to plaintiff's renal insufficiency; and (2) address the opinions of Jim I. Mertz, M.D., and Thomas T. Crouch, M.D.

Therefore, it is **ORDERED** that defendant's motion to remand (Doc. # 9) is **GRANTED**. Insofar as it requests this case be reversed and remanded, plaintiff's motion for summary judgment (Doc. No. 8) is **GRANTED IN PART** as well. The decision of the Secretary is reversed and this case is remanded pursuant to 42 U.S.C. § 405(g)(4) for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated: October 24, 2005
Kansas City, Missouri

/S/FERNANDO J. GAITAN JR.
Fernando J. Gaitan Jr.
United States District Judge